United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1041

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B/S

No. 74-1041

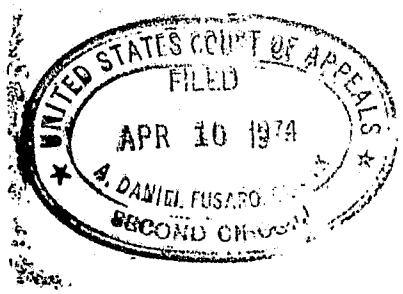
MARIA DIAZ FARO

Plaintiff-Appellant,

-against-

NEW YORK UNIVERSITY

Defendant-Appellee



On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR APPELLANT

BELLAMY BLANK GOODMAN KELLY
ROSS & STANLEY
36 West 44th Street
New York, New York 10036
(212) 869-0020

Attorneys for Plaintiff-Appellant

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ARGUMENT

I. THE DISTRICT COURT APPLIED THE WRONG STANDARD FOR PRELIMINARY RELIEF.

In its Brief, Appellee New York University argues that the district court applied the correct standard in weighing Dr. Faro's request for preliminary relief because this Court specifically requires the stronger standard of proof in a civil rights case. Specifically, the university seems to suggest that, in Pride v. Community School Board,

482 F. 2d 257 (2d Cir. 1973), this Court set forth a rule requiring that civil rights plaintiffs, to secure preliminary relief, must prove a strong likelihood of success on the merits of their claim.

This argument completely misstates this Court's holding in Pride. In that case the Court merely reaffirmed the preliminary relief standards already set forth in earlier Second Circuit cases: that is, a moving party, including a moving party in a civil rights case, can prove her case for a preliminary injunction either by showing a combination of probable success and the possibility of irreparable harm or by raising serious questions going to the merits, together with showing that the balance of hardships tips in the movant's favor. Which of these two tests a court should apply depends on the complexity of the issues involved. To reiterate, where the issues are complex and difficult, the Court should apply the second, less rigorous test. In such a case it should be enough "to raise questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation and thus for more deliberate investigation." On the other hand, where the issues are straightforward and easier to resolve, the movant should be required to make a clear showing of probable success. Checker Motors Corp. v. Chrysler Corp., 405 F. 2d 319, 323, cert. denied, 394 U.S. 999 (1969); Gulf & Western Industries, Inc. v. Great

Atlantic & Pacific Tea Co., 476 F. 2d 687, 692-93 (1973).

In the instant case the Court below was faced with a choice between these two standards. It specifically found that the questions in this case were not difficult or complex. Consequently, it rejected the lesser test which would have required only that Dr. Faro raise serious questions going to the merits. Instead, the Court imposed a standard which was, if anything, even more rigorous than the test which is normally required in straightforward cases: that is, it required that Dr. Faro show not merely a probablity of success, but "a strong likelihood of success on the merits and irreparable harm if the relief is not granted." Op. at 12 (emphasis supplied).

In imposing this very stringent standard the district court required in effect that Dr. Faro make an almost conclusive showing of discrimination. As we have shown, this standard was totally inappropriate in view of the complex nature of Title VII issues and the difficulty of proving discrimination, particularly in an academic setting, without discovery. See Brief for Appellant at 24-26. Moreover, the standard also was improper given the limited nature of the relief Dr. Faro was seeking. In moving for an injunction Dr. Faro was not, contrary to the Appellee's assertions (Brief for Appellee at 32-33, 44), asking the university to grant her tenure or to fund her research. All Dr. Faro was asking, in this preliminary proceeding, was that the university retain

her in a full-time faculty position in the tenure chain, until the merits of her claim could be investigated and resolved. The merits, of course, may include the ultimate question of whether Dr. Faro is entitled to tenure itself, but Dr. Faro does not ask the university to grant her a tenured position at this time.

Finally, the lower court should not have applied the heavier standard of proof because in doing so it exceeded its authority under Title VII itself. Title VII provides that during the first 240 days after the filing of a charge of discrimination federal and state agencies have exclusive jurisdiction over the investigation of the claim. § 706(f)(1). Thus at the time the motion for preliminary relief was heard, the district court did not have jurisdiction to consider such questions as Dr. Faro's ultimate qualifications for tenure or the existence or non-existence of sex discrimination at the medical school. Yet the Court made findings on these issues which, while technically not the law of the case, in effect have become so because the same lower court judge has been assigned the case for all purposes and is not likely to change his mind about issues on which he already has made a definitive finding. Thus, these findings effectively bar Dr. Faro from litigating the merits of her claim at any time in the future. In making these findings the Court

exceeded its authority and impinged upon the investigative authority of both the U.S. Equal Employment Opportunity Commission and the New York City Commission on Human Rights, the administrative bodies now investigating Dr. Faro's claim.

II. DR. FARO RAISED QUESTIONS SO SERIOUS AND SUBSTANTIAL THAT, UNDER THE LESSER STANDARD OF PROOF, SHE WAS ENTITLED TO AN INJUNCTION TO PRESERVE HER POSITION IN THE TENURE CHAIN.

It is clear from the record that Dr. Faro raised questions so serious and substantial that, had the district court judge properly considered the evidence, he would have found Dr. Faro entitled to a preliminary injunction. Dr. Faro raised difficult questions in two ways: first, by showing that the university failed to consider her for tenure in the Department of Rehabilitation Medicine; and second, that it failed to consider her for a tenure chain appointment in either Rehabilitation Medicine or the Department of Cell Biology.

1. Consideration for Tenure. As to tenure, the simple facts which emerge from the university's rhetoric are as follows: In July 1971, the university tried to remove Dr. Faro from a tenure chain position and in so doing indicated that it did not consider her eligible to be considered for tenure and would not so consider her at any time in the future. Dr. Faro's response to this was to

seek other tenure chain positions which would have kept her options for tenure open. The university continued to reject her request and it continued to adhere to its position that it need not consider her for tenure. At no time did the university suggest Dr. Faro was not qualified for tenure when measured against its extremely subjective standards. Tr. at 153. The only reason the university gave for taking this position was that, according to By-law 73, since Dr. Faro was paid partly out of grants, she was not "in the tenure chain."

This reason however, is clearly pretextual since NYU consistently gives tenure and/or tenure chain appointments to other, male, faculty who also are paid out of grants. See Brief for Appellant at 34-42. In other words, although Dr. Faro may not be "in the tenure chain" under By-law 73, that By-law is not applied equally to both sexes. In reaching its conclusion that Dr. Faro had not established a meritorious case, however, the judge simply ignored this evidence. As we have shown, this was clear legal error under McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

NYU now shifts ground on appeal and argues that the real reason Dr. Faro is not entitled to tenure in the Department of Rehabilitation Medicine is not because she was paid from special grants but because she did no teaching

in that particular department. Thus the university claims her situation was different from that of male faculty members in Rehabilitation Medicine who do hold tenure or tenure chain appointments. Brief for Appellee at 47-48.

The district court held against Dr. Faro on the tenure issue, however, not because she supposedly taught less than male faculty members, but because she supposedly was paid differently. Even if the Court had considered teaching experience determinative, it would have had to consider the evidence that other members of Rehabilitation Medicine, all men with tenure or tenure chain appointments, also did relatively little teaching in that department. The classic example is Dr. Nosrat Naftchi, who, although he is in the tenure chain in Rehabilitation Medicine, has done no teaching at all in that department. See Brief for Appellant at 38, 39-41.

Had it analyzed the teaching argument, the Court also would have had to consider the evidence that, given the strong research orientation of Rehabilitation Medicine, few if any members of that department actually spend much time teaching. See Brief for Appellant at 407. In addition, it would have had to consider the strong evidence that university witnesses consistently underrated Dr. Faro's actual teaching experience when comparing it with the teaching experience of her male colleagues. See Brief for Appellant at

41, n. 25. Had it considered all these factors, the district court would have found that NYU's teaching argument, like its special funds argument, is merely pretextual, and a cloak for discrimination.

The fact that NYU also removed some men from the tenure chain does not weaken Dr. Faro's claim of discrimination.* Unlike the other persons who received the July 1971 demotion letter, Dr. Faro rejected the demotion and affirmatively indicated her interest in: (1) maintaining a tenure chain appointment in the Department of Rehabilitation Medicine or any other department; and (2) securing tenure itself at some point in the future. The university discriminated against her, not by sending her the demotion letter in the first place, but by refusing to consider her for a new tenure chain appointment once she had affirmatively put herself forward as a candidate for such a position. In the process, of course, the university also made it clear that it would not consider Dr. Faro for tenure itself.

*If it is true, as Appellee points out in its brief (Brief for Appellee at 11), that only six of the eleven employees to whom the July 1971 demotion letter was sent were males, then almost half the demoted employees were female. Since only 9% of the total faculty is female (Op. at 14), the 50% figure seems extraordinarily high and is another indication of sex discrimination.

This failure to consider Dr. Faro, if the university did so for reasons of sex discrimination, was illegal under Gillin v. Federal Paper Board Co., 479 F. 2d (2d Cir. 1973). Although the school did not, of course, give sex discrimination as its reason, the reasons it did give are clearly pretextual. Thus the only remaining explanation on this record for the university's behavior is sex discrimination. At the very least, Dr. Faro has raised inferences of such discrimination which are serious and substantial enough to justify a preliminary injunction.

2. The Cell Biology Appointment. On this second issue the university replies that parts of the record -- Dr. Faro's own testimony and her January 29, 1973, letter to Dr. Rusk -- support the court's finding that she would accept only a Cell Biology appointment with tenure and an opportunity to continue her research. Interpreting this evidence in this way, however, takes it out of context and ignores the real sequence of events which occurred between July 1971 and September 1973. The conversation with Dr. Sabatini in April 1972 followed numerous meetings in which Dr. Faro sought nothing more than a reappointment at her existing level, i.e., as an Assistant Professor in the tenure chain. Her request for a transfer was confirmed in Dr. Rusk's October 1971 memorandum to Dr. Bennett. Def. Exhibit V. The conclusion follows that

when Dr. Faro spoke to Dr. Sabatini, she may have indicated her ultimate interest in tenure, but she did so not because she insisted on immediate tenure in his Department, but only because she wanted a Cell Biology appointment with tenure potential. This in fact is precisely why Dr. Faro rejected the new designation in Rehabilitation Medicine, not because it did not carry tenure, but because it was outside the tenure chain.

A tenure chain appointment in Cell Biology, however, easily could have been made since, unlike a tenured appointment, it would not have involved the university in any long-term financial commitment. In fact, a tenure chain appointment would have required nothing more than that the Department pay Dr. Faro a full-time faculty salary. This it obviously could do, since it clearly had the funds during the same period to hire various male teachers: Drs. Shafland, Alves, Adesnik, Lake, et al. See Brief for Appellant at 19. Moreover, the record shows that the university could have made other funds available to the Department had it wished to do so. See Brief for Appellant at 42, n. 26.

Finally, as to the January 29, 1973, letter, once again the university ignores the fact that while Dr. Faro certainly desired to continue her research if possible, by March 1973 she was willing to accept a faculty appointment in the tenure chain on almost any terms. This is borne out

by her frantic efforts, after March 1973, to reach some kind of settlement with the university (See Brief for Appellant at 17-21) and by her own statement to Dr. Goodgold, on May 11, that she did not want to leave the medical school since other teaching jobs in which she was interested were being offered to men and not to her. See Brief for Appellant at 17-18.

III. IF THE INJUNCTION IS NOT GRANTED DR. FARO WILL SUFFER IRREPARABLE HARM.

NYU's remaining argument is that Dr. Faro will not suffer irreparable injury if the preliminary injunction does not issue, and that as between the two parties, the balance of hardships tips in favor of the university.

The most recent case on the requirement of irreparable harm in preliminary injunction cases is Sampson v. Murray, 42 U.S.L.W. 4221 (U.S., Feb. 19, 1974). In Sampson, the Supreme Court held that a government employee who was discharged from her job did not suffer an irreparable injury since the damage to her reputation, under the particular facts of that case, was minimal, and since she could be adequately compensated through monetary damages. At the same time, however, the Court recognized that there could be extraordinary cases in which an employee's discharge could cause such serious and irreparable hardship that preliminary relief would be justified.

This is one of those extraordinary situations. Dr. Faro is a professional employee: a scientist and an academician. As we have shown, she is injured by NYU's actions against her not so much because of her monetary loss, but because her professional career has been disrupted. See Brief for Appellant at 48-53. The university's action has caused a break in Dr. Faro's career and forced her to stop working for the first time in the twelve years since she earned her doctorate degree. During the period she is away from NYU (particularly if she continues to be unable to find other employment) she will lose her professional contacts, in both the university community and the world of government and privately-funded research. In addition, she loses research opportunities, as well as the opportunity to continue to maintain and develop her skills as a teacher. These are injuries which can never be recompensed, no matter how much money Dr. Faro may be awarded after a trial on the merits, and even if she is ultimately reinstated.

Moreover, the longer Dr. Faro is unemployed the greater the harm to her reputation no matter how many letters Dr. Rusk writes protesting that finances alone occasioned her dismissal. Such letters simply do not carry much weight in the academic world, where other universities and potential employers know that at the same time NYU fired Dr. Faro, supposedly for financial reasons, it continued to hire other faculty. The plain fact is that Dr. Faro's dismissal cannot

help but irreparably injure her reputation and, accordingly, her ability to secure other employment. Dr. Potter recognized this himself when he testified that he would hesitate to give an academic appointment himself to someone who had been dismissed from a medical school faculty as Dr. Faro was dismissed, even in spite of the Rusk letter stressing her competence. Tr. at 237-38.

Irreparable injury exists in this case where it does not exist in Sampson for another reason. While the university claims that in Sampson the discharged employee sought preliminary relief -- reinstatement -- which was no greater than the most extensive relief she could have recovered on the merits (Brief for Appellee at 36-37), that is not the case here. In this preliminary proceeding Dr. Faro asks only to be retained in an Assistant Professor position, within the tenure chain but not with tenure, until the merits of her claims regarding tenure and promotion (to Associate Professor) can be resolved. The temporary relief she seeks is to stay on as an Assistant Professor; the permanent relief she will seek if she succeeds after a full trial is to be considered for both promotion and tenure.

Thus, unlike the situation in Sampson, the damage Dr. Faro will suffer if preliminary relief is not granted is irreparable. On the other hand, the damage to NYU if relief is granted is negligible. Dr. Faro is not now

asking for either tenure or a promotion. Therefore, if relief is granted, the university will not be forced to make a life-long financial commitment to her, but only an interim commitment to continue paying her salary as an Assistant Professor. In addition, if relief is granted the university will not, as it claims, be forced to maintain her research staff, laboratory facilities and primate colony, since all Dr. Faro wants for the present is a teaching appointment and not the continuation of her research. In any event, the record shows that the university has vast financial resources and great flexibility in paying faculty salaries. See Brief for Appellant at 7-8 and 42, n. 26. It is difficult to believe it will be hard-pressed financially to maintain Dr. Faro's salary as an Assistant Professor. As between the two parties -- a large institutional defendant on the one hand and an individual employee challenging what she believes are discriminatory practices on the other -- the balance of hardships clearly tips in favor of Dr. Faro's claim for reinstatement.

Respectfully submitted,

Diane Serafin Blank

Diane Serafin Blank

Nancy E. Stanley

Nancy E. Stanley

BELLAMY BLANK GOODMAN KELLY ROSS
& STANLEY

36 West 44th Street
New York, New York 10036
(212) 869-0020

Attorneys for Appellant

April 5, 1974

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing reply brief for the Appellant have been mailed this day, postage prepaid, to the following counsel of record:

William C. Porth. Esq.
Suite 1-A
1 Washington Square Village
New York, New York 10012

Carol Lynn Green, Esq.
Office of the General Counsel
U.S. Equal Employment Opportunity Commission
1800 G Street, N. W.
Washington, D. C. 20506

Diane Serafin Blank

Diane Serafin Blank

BELLAMY BLANK GOODMAN KELLY ROSS
& STANLEY
36 West 44th Street
New York, New York 10036
(212) 869-0020

Attorneys for Appellant

April 5, 1974